Supreme Court, U.S.
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No. 96-945

In The

Supreme Court of the United States

October Term, 1996

R. DERRY CROSBY, D.O.,

Petitioner,

vs.

HOSPITAL AUTHORITY OF VALDOSTA AND LOWNDES COUNTY, GEORGIA, d/b/a SOUTH GEORGIA MEDICAL CENTER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR MEDICAL STAFF RESPONDENTS

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I

Petitioner seeks review of the opinion of the Eleventh Circuit Court of Appeals reported at 93 F.3d 1515 (11th Cir. 1996), which appears as Appendix A to the Petition. This Court has previously considered and stated the proper rule of law applicable to the present case; the Eleventh Circuit analyzed and applied this precedent in considering the matter below; and the Eleventh Circuit's ruling was consistent with this Court's prior mandates. There is no error necessitating correction. This case likewise raises no important question of federal law which must be settled by this Court inasmuch as the "question" previously has been settled. S. Ct. R. 10(c). The Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

In jumbled fashion, Petitioner condemns a state mandated and supervised system of ensuring and maintaining quality medical care in Georgia via the review of credentials in the award of hospital staff privileges in a Petition which is high on concocted intrigue, but short on substantive merit. He denounces a decision of the Hospital Authority of Valdosta and Lowndes County, Georgia (hereinafter "the Authority") denying him hospital staff privileges at the South Georgia Medical Center (SGMC) based upon a hospital Bylaw requiring orthopaedic surgeons applying for staff membership in the specialty of Orthopedics to demonstrate "eligibility in the specialty as designated by the American Board of Orthopedics and be either board certified or board eligible".[1] (SGMC Bylaws, Art. X, § 2(b)(4)).

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1. It was undisputed in the courts below that the reference to the American Board of Orthopaedics meant the American Board of Orthopaedic Surgery and that Petitioner was aware of this. (Appendix B, pp. 56a-57a, n.3).

Petitioner disingenuously suggests that he was denied staff privileges as part of some larger design by doctors of medicine (allopathic physicians) at SGMC against Petitioner "simply because [he] was trained as and holds a [Doctor of Osteopathy] degree." (Pet. 11). He further states it to be "undisputed that Petitioner's education and training met the standards of the Liaison Committee on Medical Education, as required by Article III, Section 23(f) of the SGMC By-laws". (Pet. 4). On this foundation, Petitioner argued unsuccessfully in the courts below that he was the victim of an illegal conspiracy in restraint of trade in violation of the Sherman Act.

In point of fact, Petitioner's application for staff privileges was denied not because he is an osteopathic physician, but for the reason that he completed a residency training program which was not approved by the American Board of Orthopaedic Surgery, and because he consequently was not board certified and not board eligible as required by the SGMC Bylaw.[2] The **material** undisputed fact in the trial court was that Petitioner did not meet the educational requirements for staff privileges at SGMC pursuant to the hospital Bylaws as adopted and approved by the Authority.[3] Petitioner's claim that he was denied staff privileges because he was an osteopath and that the decision

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2. A substantially similar bylaw was held constitutional in *Silverstein v. Gwinnett Hospital Auth.*, 861 F.2d 1560 (11th Cir. 1988) notwithstanding the fact that it distinguished osteopathic and allopathic training.

3. Quite contrary to Petitioner's suggestion, the evidence in the district court was that Petitioner's former orthopedic surgical partner had surgical staff privileges at SGMC, notwithstanding the fact that he received his training in osteopathy, because he had completed a residency training program approved by the American Board of Orthopaedic Surgery, and was board eligible. (The District Court's opinion is reported at 873 F. Supp. 1568 (N.D. Ga. 1995) and appears as Appendix B to the Petition).

was nothing more than an effort by doctors of medicine to limit competition and "protect their incomes" finds no support whatsoever in the record of the courts below.

In considering Petitioner's Sherman Act claims, the issue before the Eleventh Circuit was whether the Authority, its Board (hereinafter "the Board"), and the individuals who participated in the various review committees respecting Petitioner's application for staff privileges (hereinafter "the Medical Staff") were subject to suit under the federal antitrust laws, or whether they were entitled to "state action immunity" as initially recognized in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). Under *Parker*, immunity arises where there is "clearly articulated and affirmatively expressed" anticompetitive conduct by a State acting through its legislature. *See generally, New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978).

In reaching its holding below, the Eleventh Circuit revisited *Parker* and a progression of cases decided thereafter including *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 23, 55 L. Ed. 2d 364 (1978), *Community Communications Co. v. Boulder*, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982), and *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985), in which state action immunity was extended to municipalities; *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980), in which "active supervision" of the state policy was added as a requirement in the case of private parties carrying out state anticompetitive policies; and *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988), in which staff privilege actions by a private Oregon hospital's executive committee were held to be

private decisions by private actors to which no immunity extended.

In light of this precedent, the Eleventh Circuit considered the existence or absence of state action immunity for the Authority, the Board, and the Medical Staff in connection with Petitioner's claims. In a carefully reasoned opinion, the court concluded that all three groups of Respondents were entitled to state action immunity.

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH CIRCUIT "DISAVOWED" NOTHING ABOUT GEORGIA LAW, BUT INSTEAD GAVE EFFECT TO A STATUTORY SCHEME AND POLICY WHICH LEGITIMATELY AUTHORIZED ANTI-COMPETITIVE RESULTS.

In determining first whether the Authority and its Board met the single prong of the test in *Town of Hallie*, the Eleventh Circuit considered: (1) whether the Authority was a political subdivision of the state; (2) whether, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) whether, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct. While neither a model of clarity nor organization, the Petition essentially asserts that the Eleventh Circuit was wrong in finding the first and third of these elements satisfied.[4]

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4. There was no contention by Petitioner in the courts below that Georgia law failed to authorize Respondents to perform the challenged action (Appendix A, p. 37), and this second element is consequently irrelevant.

A. The Eleventh Circuit properly found the Authority was a political subdivision, and this holding was consistent with precedent of the Supreme Court of Georgia.

Considering whether the Authority was a political subdivision, the Eleventh Circuit engaged in an extensive analysis of the Georgia Hospital Authorities Law under which the Authority was created, O.C.G.A. § 31-7-70 *et seq.* Under this Act, the Georgia legislature "created in and for each county and municipal corporation of the state a public body corporate and politic to be known as the 'Hospital Authority' of such county or city." O.C.G.A. § 31-7-72(a). Authorities are appointed by the governing body of the county or municipal corporation in which they are created, and are granted the same exemptions and exclusions from taxes as are granted to cities and counties for similar facilities. O.C.G.A. § 31-7-72(e). The court further noted the nature, powers and duties of authorities under Georgia law:

> A Hospital authority is "deemed to exercise public and essential government functions and [has] all the powers necessary and convenient to carry out and effectuate the purpose and provisions of [the Hospital Authorities Law]." . . . These powers include, in addition to those necessary to operate a hospital, the power to sue and be sued, to execute contracts, to exercise the right of eminent domain, to receive proceeds from the sale of general obligation or county bounds, and to issue revenue anticipation certificates or other evidence of indebtedness. . . . An authority may not operate for profit, but rather, must adjust its prices to produce only enough revenue to cover costs with

> reasonable reserves... Hospital authorities are authorized to sell "negotiable revenue anticipation certificates" for the purpose of funding their activities.... Although not a debt of any "political subdivision", these certificates "are declared to be issued for an essential public and governmental purpose and together with interest thereon and income therefrom, [are] exempt from all taxes." Although an authority does not have the power to tax, counties and cities possess the power to levy an ad valorem tax for the purpose of contracting with the authority for the provision of specific services.... Indeed, counties and their component municipalities are specifically authorized to contract with hospital authorities for the purpose of providing medical care to indigent residents of that county or municipality.... Upon dissolution, a hospital authority is not authorized, in the absence of other specific legislation, to convey any of its property to a private person, association, or corporation .... Finally the board of trustees of each authority is required to file with the governing body of the particular municipality an annual report of its activities....

Acknowledging the teachings of this Court in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636, 112 S. Ct. 2169, 2178, 119 L. Ed. 2d 410 (1992) and *Town of Hallie*, the Eleventh Circuit placed its "focus ... on whether the nexus between the State and the Authority is sufficiently strong that there is little real danger that the Authority is involved in a private price-fixing arrangement." (Appendix A, p. 17a).

In this regard, the Eleventh Circuit found compelling *Martin v. Hospital Auth.*, 264 Ga. 626, 449 S.E. 2d 827 (1994), in which the Georgia Supreme Court held hospital authorities immune from liability for punitive damages because they are "governmental entities". (Appendix A, p. 18a). The court further cited the Georgia Supreme Court in *Cox Enterprises, Inc. v. Carroll City/County Hospital Auth.*, 247 Ga. 39, 273 S.E. 2d 841, 845 (1981) in which the court held that hospital authorities are instrumentalities of the state since "they are the manner in which the state has determined to conduct its business." (Appendix A, p. 19a, *citing Cox*, 273 S.E. 2d at 846).

> Factors tending to establish the Authority's governmental nature include that it is a creature of statute; that it is defined as a "**public** body corporate and **politic**" (emphasis supplied); that its Board is appointed by the governing body of the relevant political subdivision or subdivisions; that it is tax exempt; that it is deemed to exercise public and essential governmental functions; that it may exercise the power of eminent domain; that it receives tax revenues; and that the governing bodies of the relevant political subdivisions have a role in determining the disposition of its property upon dissolution.

(Appendix A, p. 18a, *citing Cox*, 273 S.E. 2d at 845). Applying the rationale in *Town of Hallie*, the Eleventh Circuit concluded the nexus between the State and the Authority was sufficiently strong that there was little danger the Authority was involved in a private price-fixing arrangement. For purposes of state action immunity, the court concluded the Authority and its Board was a political subdivision of the state.

Petitioner relies upon *Thomas v. Hospital Auth.*, 264 Ga. 40, 440 S.E. 2d 195 (1994) in disputing the Eleventh Circuit's conclusion that the Authority is a political subdivision for purposes of state action immunity. In *Thomas*, the Georgia Supreme Court considered whether a hospital authority was entitled to sovereign immunity from liability arising in a fall down injury, and concluded that it was not. In considering whether the rationale of *Martin*, or that in *Thomas*, should apply to the question of state action immunity as a political subdivision, the Eleventh Circuit properly distinguished the concept of sovereign immunity from the doctrine of state action immunity. The court further noted that *Martin* was decided subsequent to *Thomas* and that a litany of statutory provisions establishes the governmental nature of the Authority and its activities:

> Georgia has chosen to operate its hospitals through the instrumentality of hospital authorities, and, accordingly, it has clothed these authorities with certain necessary governmental qualities. *Cf. Cox Enterprises*, 273 S.E.2d at 846("Certainly the government is authorized to operate hospitals, either directly, or as here, indirectly.")
>
> * * *
>
> The fact that the Authority engages in the competitive business of health care, or operating a hospital, does not remove it from the protective cloak of state action immunity. It is axiomatic that state action immunity includes protection for states when they engage in business. To follow the policy rationale in *Thomas* and withhold immunity in those cases where the state chooses "to

> enter an area of business ordinarily carried on by private enterprise," would be to virtually eliminate state action immunity altogether.

(Appendix A, p. 20a).

While Petitioner argues that it is *Thomas* which should control the application of state action immunity for antitrust liability, and that the Eleventh Circuit was wrong in applying the later decided *Martin* case, Petitioner fails to explain how his view of Georgia law withstands scrutiny under *Cox* and *Martin*. *Cox* is nowhere cited in the Petition; *Martin* is mentioned only in a footnote, with no substantive basis given for the claim that it does not support the Eleventh Circuit's conclusion. Beyond this, there is no novelty in the holding that hospital authorities are political subdivisions of the State, entitled to state action immunity. *Martin v. Memorial Hospital of Gulfport*, 86 F.3d 1391 (5th Cir. 1996); *FTC v. Hospital Board of Lee County*, 38 F.3d 1184 (11th Cir. 1994); *Askew v. DHC Regional Healthcare Auth.*, 995 F.2d 1033 (11th Cir. 1993), *cert. denied*, 510 U.S. 1012 (1993).

The Eleventh Circuit's conclusion that the Authority and its Board are a political subdivision of the State was correct and Petitioner's claim to the contrary is meritless.

B. The Eleventh Circuit properly found that Georgia law clearly articulated a policy authorizing anticompetitive conduct in the determination of hospital staff privileges.

Addressing whether the anticompetitive policy was "clearly articulated", the Eleventh Circuit noted that *Town of Hallie* does not require the legislature to state explicitly that it anticipates anticompetitive effects. The Eleventh Circuit took due note of

the holding in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 64-65, 105 S. Ct. 1721, 1731, 85 L. Ed. 2d 36 (1985), that a clear intent to establish an anticompetitive regulatory program is sufficient whether the State describes the implementation of its policy in detail or not. The Eleventh Circuit properly noted the singular requirement that the anticompetitive conduct be a "foreseeable result" of the powers granted to the political subdivision. *Town of Hallie*, 471 U.S. at 39.

The Eleventh Circuit then turned to a consideration of the precise anticompetitive conduct alleged by Petitioner to determine whether it was a reasonably foreseeable result of the statutes authorizing the Authority to grant or deny staff privilege applications. In this regard, the Eleventh Circuit quoted the relevant provisions of O.C.G.A. § 31-7-7:

> (a) Whenever any licensed doctor of medicine, doctor of podiatric medicine, doctor of osteopathic medicine, or doctor of dentistry shall make application for permission to treat patients in any hospital owned or operated by the state, any political subdivisions thereof, or any municipality, the hospital shall act in a nondiscriminatory manner upon such application expeditiously and without unnecessary delay considering the applicant on the basis of the applicant's demonstrated training, experience, competence, and availability of reasonable objectives, **including, but not limited to, the appropriate utilization of hospital facilities** . . . .

(Appendix A, p. 33a). In considering this language, the Eleventh

Circuit concluded that the clear articulation question "is not a close one." (Appendix A, p. 42a). Since hospitals are authorized to make staff privilege decisions based on any reasonable objective, "including, but not limited to, the appropriate utilization of hospital facilities." O.C.G.A. 31-7-7, the court agreed with the lower court that it "is at the very least foreseeable, and most certainly reasonably anticipated, that this language would enable a hospital authority to engage in anticompetitive conduct through its peer review activities." (Appendix A, p. 42a). The court concluded:

> This is not the type of case in which we must discern what type of conduct is reasonably anticipated from a broad authorization to act. Rather, the statute explicitly provides for precisely the anticompetitive conduct about which [Petitioner] complains. At worst, [Petitioner] alleges that the SGMC orthopedic surgeons determined that their services were sufficient to meet the demand for their specialty at the hospital and, therefore, agreed to deny [Petitioner] hospital privileges. This is exactly what the statute directs SGMC and the Authority to do. We readily conclude that O.C.G.A. § 31-7-7 evidences a state policy in favor of the anticompetitive conduct challenged in this case and hold that all defendants are shielded from suit or state action immunity.

(Appendix A, p. 42a). This finding was consistent with prior decisions of the Eleventh Circuit holding that the denial of staff privileges is the forseeable result of state legislation authorizing medical staff peer review. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991); *Bolt v. Halifax Hospital Medical Ctr.*, 980 F.2d 1381 (11th Cir. 1993).

The court found this conclusion strongly supported by the provisions of O.C.G.A. § 31-7-15, which not only authorizes but requires hospitals to conduct peer review in order to be permitted to operate, and which further permits peer review committees to perform these evaluations. The Eleventh Circuit acknowledged the reality recognized in O.C.G.A. § 31-7-15 that medical staff credentialing decisions are a vital part of the process "because they are in the best position to measure the quality of a physician's work and credentials". (Appendix A, pp. 42a-43a).

On this front, too, Petitioner disputes the propriety of the Eleventh Circuit's holding, firing a barrage of arguments which are alternatively confusing, circular and meritless. Petitioner offers varying arguments respecting the significance of a Georgia constitutional provision prohibiting contracts or agreements in restraint of trade, Article III, § 6, ¶ 5, all of which were duly considered by the Eleventh Circuit and rejected. Petitioner assigns error to the court's refusal to consider in light of this constitutional provision the constitutionality of the particular statutory scheme reflecting the anticompetitive policy at issue. The Eleventh Circuit correctly found, however, that its task in determining the existence of state action immunity was whether the Georgia legislature had articulated a policy with anticompetitive results, not whether these enactments, upon implementation, are constitutional. Constitutional or not, the statutes reflect the policy which is the singular focus of the state action immunity test. This approach finds support in the holding of this Court in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) in which it was stated that courts must adopt a concept of authority broader than that applied in determining the legality of municipal action under state law or risk destroying the very interest of federalism *Parker* sought to protect. The Eleventh Circuit properly so held. (Appendix A, p. 44a). Petitioner's claim that

the statutes reflecting the anticompetitive policy at issue are unconstitutional is irrelevant, and the Eleventh Circuit properly so held.

The Eleventh Circuit also correctly disposed of an alternative argument by Petitioner: that the subject constitutional provision "clarifies" state policy and effectively prevents a finding of a clearly articulated intent to approve anticompetitive conduct. The Eleventh Circuit concluded that to the extent restrictive covenants in employment contracts are enforceable under Georgia law notwithstanding the Georgia constitutional provision respecting restraints on trade, the same outcome would apply to a state statute aimed at empowering a political subdivision to provide for the health and welfare of its residents. In addition to the fact that *City of Columbia* precludes inquiry into whether the statutes at issue are constitutional, despite what Petitioner suggests, the Georgia Supreme Court did not in *Jackson and Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E. 2d 253 (1991) overturn the "rule of reason" which applies to application of the Georgia constitutional provision proscribing contracts or agreements in restraint of trade. *McAlpin v. Coweta Fayette Surgical Associates*, 217 Ga. App. 669, 458 S.E. 2d 499 (1995); *National Emergency Service, Inc. v. Wetherby*, 217 Ga. App. 42, 456 S.E. 2d 639 (1995).

Furthermore, the fact that the Georgia Supreme Court has elected not to enforce restrictive covenants in private employment contracts in light of the Georgia Constitution is irrelevant to the question of whether the constitutional provision would proscribe a statutory scheme granting authority to a political subdivision with anticompetitive results. Whatever Petitioner contends, *Hart* is no statement or even a forecast that Georgia's Hospital Authorities Law is unconstitutional. In fact, the proper test would be whether the restraint involved is injurious to the public. *City of Calhoun v. North Ga. Elect.*

Membership Corp., 233 Ga. 759, 213 S.E. 2d 596 (1975). With respect to the Hospital Authorities Law, the public is clearly served, not injured.

Moving beyond the constitutional argument, Petitioner argues that the statutory scheme creating the Authority, O.C.G.A. § 31-7-70 *et seq.*, does not authorize conduct affecting competition. Petitioner cites various statutes respecting the licensing of medical doctors and doctors of osteopathy; the availability of state funds for both allopathic and osteopathic medical schools; and the singular state licensing exam for both allopathic and osteopathic physicians. Reading these statutory schemes together, Petitioner contends that "Georgia does not show any clear indication that the Legislature intended to permit any governing body to restrict or eliminate competition or that such a result was foreseeable." (Pet. 11). This argument simply ignores the clear and unambiguous provisions of the statutory provisions creating hospital authorities and empowering them to act on behalf of the State. Furthermore, Georgia law allows hospital authorities to expand on the statutory minimum requirements for licensure, *Cobb County-Kennestone Hospital Auth. v. Prince*, 242 Ga. 139, 249 S.E. 2d 581 (1978), and to require medical staff applicants to attend ACGME accredited residency programs. *Silverstein v. Gwinnett County Hospital Auth., supra.*

II.

THE ELEVENTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH *TICOR*, *PATRICK*, OR *CITY OF LAFAYETTE* AS ALLEGED BY PETITIONER, BUT IS ENTIRELY CONSISTENT WITH THEM.

A. The court below correctly concluded that the medical staff acted as the agent of the Authority and that it was unnecessary to reach the "active supervision" prong of the *Midcal* test.

Having concluded that the Authority is a political subdivision; that the Authority is generally authorized to perform the challenged conduct; and that there was clear articulation of a policy authorizing the anticompetitive conduct, the Eleventh Circuit properly concluded that state action immunity applied to the Authority and the Board. The court then turned to the question of whether immunity was available to the Medical Staff by application of the single prong *Town of Hallie* test, or whether the second prong adopted in *Midcal* requiring "active supervision" by the State had to be satisfied.

The Eleventh Circuit's proper focus in this regard was whether the medical staff acted as private actors in participating in the peer review process or whether they acted as agents of the state. In an extensive and carefully reasoned analysis, the Eleventh Circuit concluded that the Medical Staff acted as the agent of the Authority and was consequently entitled to state action immunity. Although the Eleventh Circuit rejected the basis on which the District Court found the medical staff to be the agents of the Authority,[5] it nonetheless found the ultimate finding of agency to be correct.

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5. The Eleventh Circuit declined to follow *Cohn v. Bond*, 953 F.2d 154 (Cont'd)

The Eleventh Circuit recognized that merely because a hospital and its staff are separate economic or legal entities does not mean that a staff physician cannot be the agent of a hospital for certain purposes, such as in the peer review process. The court noted the District Court's finding that each individual medical staff respondent acted within the scope of his or her duty as a member of the various credentialing committees. (Appendix A, p. 32a, n. 20). The Eleventh Circuit concluded that the actions of the individual medical staff Respondents consisted exclusively of official actions taken as members of the hospital's peer review committees. (Appendix A, p. 32a).

The court next considered whether the individuals' actions were those of the Authority, and turned again to the teaching of *Town of Hallie*, in which the appropriate inquiry was stated to be whether "there is . . . danger that [the actor] is involved in a private price-fixing arrangement" *Town of Hallie*, 471 U.S. at 34, as opposed to state action vindicating a truly governmental interest. As with the Authority and the Board, the court proceeded to consider whether the nexus between the State and the actions of the Medical Staff was sufficiently strong that there was little real danger that the individual physicians were involved in a private price-fixing arrangement.

In considering this issue, the Eleventh Circuit found compelling the extent of control exercised by the Authority over the staff privilege process and noted that under the Bylaws of SGMC, it was the **Authority itself** with the ultimate power over decisions to grant or deny hospital privileges. Thus, while acknowledging the numerous layers of staff committees which **recommend** the grant or denial of staff privileges to the

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(Cont'd)
(4th Cir. 1991), *cert. denied*, 505 U.S. 1230, 112 S. Ct. 3057, 120 L. Ed. 2d 922 (1992), as contrary to its holding in *Bolt v. Halifax Hospital Medical Ctr.*, 891 F.2d 810 (11th Cir. 1990).

Authority (Appendix A, p. 6), "the Authority is the ultimate repository of ultimate decision making power and exercises plenary review of all credentialing decision." (Appendix A, p. 33a). This very fact was acknowledged in *Ramey v. Hospital Auth.*, 218 Ga. App. 618, 462 S.E. 2d 787 (1995), in which the Georgia Court of Appeals stated that under Georgia law, "the hospital authority, and not the medical staff, is responsible for selecting staff members." *Ramey*, 462 S.E. 2d 788.

> Under the Bylaws, the Authority does not merely "rubber stamp" the committee recommendations; instead, it conducts an independent, meaningful review. It retains the power to follow, modify, or even disregard the recommendations of the staff committees. In this case, it rendered its decision only after a full hearing at which [Petitioner] was represented by counsel.

(Appendix A, p. 33a).

The Eleventh Circuit further noted the integral relationship between hospitals and peer review under the Georgia statutory scheme, noting that hospitals are required to provide for peer review, and are specifically directed to evaluate the qualifications and professional competence of persons seeking to perform medical and health care services at the hospital. O.C.G.A. § 31-7-15(a)(3). At the same time, peer review committees are expressly authorized by statute to perform such evaluations and can be appointed by the governing board or medical staff of a licensed hospital. O.C.G.A. § 31-7-15(b).

> This statutory scheme reflects the reality of management at the Authority (and other hospitals). Physicians at hospitals often work

> in a variety of capacities. Primarily, they are "separate economic entities," i.e., independent contractors, as noted by the court in *Bolt III*. At times, they also function as part of the hospital's management structure. In particular, they are called on to aid in staff credentialing decisions because they are in the best position to measure the quality of a physician's work and credentials, a proposition recognized by O.C.G.A. § 31-7-15.

(Appendix A, p. 35a). The court concluded:

> The only actions in this case were those of the Authority, a political subdivision of Georgia. Were we to rule otherwise, the state action immunity afforded the Authority would be meaningless because as a practical matter the Authority must act through its agents.

(Appendix A, pp. 35a-36a).

Petitioner argues that this finding is inconsistent with the holdings of this Court in *Ticor* and *Patrick*, and is contrary to the decision of the Ninth Circuit in *Lancaster County Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991).

Addressing *Lancaster County* first, Petitioner states that the Ninth Circuit found language similar to that in the Georgia statutes "cannot be said to evidence a clearly articulated state policy authorizing anti-competitive activity in the selection of medical staff." (Pet. 19). This is a gross misstatement of the

Ninth Circuit's holding inasmuch as *Lancaster County* had nothing whatsoever to do with peer review.

Petitioner heralds *Patrick* as validation of his contention that the Medical Staff necessarily acted as private actors in making their recommendations to the Authority respecting Petitioner's staff privileges, but completely disregards the factual basis on which *Patrick* was decided. In *Patrick*, the plaintiff was a former employee of a medical clinic in a small Oregon city with a single, private hospital not operated by a political subdivision who left the clinic and began an independent surgical practice in competition with his former employer. After two tumultuous years of practice in which the plaintiff endured consistent refusals by clinic physicians to have professional dealings with or refer patients to him; refused to assist plaintiff with his own patients by providing consultations; and refused to provide backup coverage for patients under the plaintiff's care (all the while being criticized by these very physicians for failing to obtain outside consultations and obtain adequate backup coverage), the executive committee of the hospital staff at the request of a clinic physician voted to recommend termination of plaintiff's privileges. At a hearing on the matter chaired by another clinic physician, the plaintiff requested that the members of the committee testify as to their personal bias against plaintiff but they refused. Before the committee rendered a decision on plaintiff's continued staff privileges, he resigned.

Two principal factors ultimately led this Court to conclude that the acts of the hospital staff in reviewing the plaintiff's staff privileges were not protected by the doctrine of state immunity: (1) an apparently uncontested finding by the Ninth Circuit that the defendants had acted in bad faith in the peer-review process, conduct described by that court as "shabby, unprincipled and unprofessional" *Parker*, 486 U.S. at 97; and (2) the complete absence of any mechanism whereby staff privilege decisions of

the medical staff were reviewed by any state actor, together with a nonexistent system whereby a state actor could overturn a peer-review decision if contrary to state regulatory policy.

The facts are simply otherwise here. Whatever Petitioner claims about the Medical Staff Respondents here wishing to "protect their own incomes", there was absolutely **no** evidence in the courts below that Petitioner was denied staff privileges for any reason other than his failure and inability to meet the educational requirements of the hospital Bylaws[6]. There was no evidence of "bad faith" or personal animus as existed in *Patrick*, which was the very basis on which this Court concluded that the action taken therein was private in nature rather than on behalf of the State. This was the very reason the active supervision prong of *Midcal* was simultaneously found to apply and not to have been met. The facts presented here could not be more factually dissimilar. That the medical staff in *Patrick* was found to be acting as a private party subject to the *Midcal* test does not equate with a holding that under any facts and in all circumstances a hospital's medical staff acts privately rather than in the State's interest. Petitioner's simplistic suggestion otherwise is simply wrong.

The same is true of *Ticor* on which Petitioner also places significant, but patently undue, weight. In *Ticor*, the defendants were title insurance companies allegedly fixing prices and fees for title searches and examinations. They acted collectively

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6. In the initial committee review by the Orthopedic Service of the Department of Surgery, the committee indicated in addition to Petitioner's training deficiency that there were a sufficient number of orthopedic surgeons already on the hospital staff. When that committee's recommendation went to the Credentials Committee, however, that committee dropped this ground for denying the application and it was not the basis of any decision rendered thereafter either by any committee or by the Authority itself in ultimately denying the application.

through a "rate bureau" which filed rates with the State, and which became effective unless rejected by the State within a certain time period. None of the states whose rating systems were at issue actually participated in any monitoring or review of the rate setting activity. There was no meaningful State involvement of any kind. This Court held:

> When prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate setting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State. Under these standards, we must conclude that there was no active supervision. . . .

Ticor, 504 U.S. at 621. Although the defendants contended the rating systems were State "supervised", two of the States with the responsibility of supervision filed a brief as amici curiae denying that the immunity sought by the defendants would serve the States' best interests. The facts in *Ticor* hardly equate with the facts presented here.

Furthermore, this Court in *Ticor* made clear that its decision was motivated to a great extent by the conduct involved: price fixing.

> No antitrust offense is more pernicious than price fixing. . . . In this context, we decline to formulate a rule that would lead to a finding of active supervision where in fact

> there was none. Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision.

Ticor, 504 U.S. at 639. Applying this approach to the present facts clearly gives rise to a different outcome than that in *Ticor*. As in *Patrick*, *Ticor* involved private actors making private decisions rather than mere recommendations based upon State interests subject to ultimate decision by a State authorized actor. Neither case is determinative of the present facts and neither supports Petitioner's claim of error below.

B. Even if the active supervision prong of *Midcal* applied, there was active State supervision.

The Eleventh Circuit concluded that because the Medical Staff participates in the staff privilege process by validation of state statute and because the ultimate decision about staff privileges is made by the Authority and not the Medical Staff, the Medical Staff acts not as private actors based upon private interests, but instead acts on behalf of the Authority in fulfilling a critical state function. Having so concluded, the second prong of *Midcal* was irrelevant and no active supervision by the State needed be shown.

The Eleventh Circuit aptly noted, however, that this very participation by the Authority in the staff privilege decision process, and its ultimate control over the extension or denial of staff privileges, itself constituted active supervision over the medical staff in the process. There is no "inconsistency" as contended by Petitioner. The simple fact is that the degree of involvement by the Authority in the staff privilege process demonstrates both the extent to which the Medical Staff acts merely as the agent of the Authority, and the existence of active supervision by the Authority in the process.

Beyond the fact that the active supervision prong was found inapplicable under the facts, Petitioner's scant contention that the Authority cannot serve the supervisory function under the *Midcal* test is simply not supported by the law. The Eleventh Circuit acknowledged the reality that in some contexts, the State must act through private actors, and that these individuals can nonetheless act as the State's agents. Taking Petitioner's contention to its logical extreme, no individual would ever be capable of serving the supervisory function, since the State in all respects must necessarily operate through the conduit of individuals.

Petitioner's arguments that no state action immunity extended to the Medical Staff are meritless.

CONCLUSION

The Eleventh Circuit's holding was correct and for the reasons discussed above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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